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1 APPEARANCES CONTINUED:

2 For Todd VanDeHey:

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6 For Real Social Dynamics, Inc.; Owen Cook; Nicholas Kho:

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11 Also Present:

12 Todd VanDeHey
13 Nicholas Kho

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1 LAS VEGAS, NEVADA; FRIDAY, DECEMBER 8, 2017; 9:57 A.M.

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3 P R O C E E D I N G S

4 COURTROOM ADMINISTRATOR: All rise.

5 THE COURT: Good morning. Please have a seat.

6 COURTROOM ADMINISTRATOR: Now is the time set for a
7 motion hearing in Case No. 2:17-cv-2230-JAD-NJK, Todd VanDeHey
8 versus Real Social Dynamics, Inc., et al.

9 Counsel, please state your appearances.

10 MR. PROCACCINI: Good morning, Your Honor. Steven
11 Procaccini with the Nissenbaum Law Group on behalf of
12 plaintiff, Mr. VanDeHey.

13 MR. OGILVIE: George Ogilvie as cocounsel, Your Honor.

14 THE COURT: Good morning.

15 MR. GUTIERREZ: Good morning, Your Honor. Joseph
16 Gutierrez and Steven Knauss on behalf of the defendants. With
17 me today is Nicholas Kho.

18 THE COURT: All right. Good morning, everybody.

19 So we are here on Plaintiff's Emergency Motion for
20 Temporary Restraining Order and Preliminary Injunction. These
21 requests are found at numbers 52 and 53 in the docket.

22 I have reviewed all of the parties' submissions
23 including the defendant's response at numbers 62 and 63 and
24 then the reply at 64 and 65.

25 Just to put on the record, I recognize there are other

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1 motions pending in this case, dispositive motions pending in
2 this case, so -- including a Motion for Summary Judgment, a
3 Motion to Compel Arbitration or Dismiss, and a Motion to Amend
4 the Complaint. Those are not noticed for this hearing today.
5 This is just this Emergency Motion on the TRO and the
6 Preliminary Injunction. Those other motions will be decided in
7 the ordinary course. And, unfortunately, they are in a line of
8 dispositive motions that's about 250 motions long.

9 So, with the understanding that I have read everything,
10 who will be arguing for the plaintiff?

11 MR. PROCACCINI: I will, Your Honor.

12 THE COURT: Okay. The podium is yours, sir.

13 MR. PROCACCINI: Thank you.

14 THE COURT: And in your argument -- pronounce your last
15 name for me, again.

16 MR. PROCACCINI: Procaccini, Your Honor.

17 THE COURT: Procaccini.

18 -- if you could address for me why we haven't had a
19 Rule 26 conference or a discovery plan and order entered yet in
20 this case and why these issues can't be handled in the ordinary
21 course of discovery.

22 MR. PROCACCINI: Sure, Your Honor.

23 So you may recall that we made a Motion to Amend the
24 Complaint against previously then unknown defendants.

25 THE COURT: Right.

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1 MR. PROCACCINI: And, you know, those issues that
2 related to the Computer Storage Act as well as the Computer
3 Fraud and Abuse Act were germane to any of the rights that were
4 being infringed by our client. They were not contemplated by
5 any independent contractor agreement or LLC operating agreement
6 that was formed between the parties which went to the
7 defendant's argument that everything should be -- every dispute
8 between the parties should be subject to arbitration.

9 So Your Honor may recall that with the amending of the
10 Complaint we were permitted to take what I would say is akin to
11 pre-action discovery, which is to learn the identity of these
12 unknown defendants. And so there we are left with basically a
13 Complaint that had to be -- had yet to be joined. So that
14 would be a rationale for not having the discovery -- necessary
15 Rule 16 conference before the defendants who were then unknown
16 would be brought into the case. We probably would have to do
17 the discovery plan over again, at least given the opportunity
18 of these unknown defendants to be joined.

19 And, Your Honor, the delay would -- after, you know,
20 the papers that we received two days ago, finally three months
21 after our initial concern that some unknown party was hacking
22 into my client's email forwarding our attorney-client
23 communications about this litigation to some unknown party, it
24 was basically -- you know, we were told that we're just being
25 present -- we're presenting the Court with nothing more than

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1 suspicions; you're asking for discovery; give us written
2 requests; and then we would ask for information and they would
3 say you're asking us to turn over privileged communications as
4 if -- as though somehow stealing my client's attorney-client
5 communications, giving it to an attorney somehow vests a
6 privilege in the defendants.

7 So, basically, Your Honor, we tried every way that we
8 could to have our client's attorney-client communications that
9 were stolen from him three days after we were here on the last
10 emergency motion returned back to us. And this simply was not
11 something where we could just serve our interrogatories and
12 motions to compel, requests for admissions. Six months down
13 the line we're facing a motion for default in an arbitration.
14 All of our arbitration strategies are in that Gmail account.
15 Everything is in there. If there's a potential conflict, which
16 I believe exists, counsel for the defendant shouldn't even be a
17 part of this case. So this -- first and foremost, we know
18 damage has been done; the question is how much. We know
19 information has to be protected; the question is to what
20 lengths do we have to go to protect it.

21 We have no idea how long this defendant was poking
22 around in this Gmail account. We do know -- we have not yet
23 received third-party subpoena responses from Microsoft -- or
24 from Hotmail -- I'm sorry -- which would go to this t -- Todd
25 Valen- -- Valentine Hotmail account where the attorney-client

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1 privileged communications was forwarded to.

2 So, you know, unfortunately, within three months, Your
3 Honor, we've been able -- we've been forced solely by
4 defendants' discretion to jump through hoops: hire a forensic
5 examiner, serve third-party discovery, get everything. And
6 then, two days before this hearing, they say, oh, yeah, it was
7 me; but we were well within our rights to do so. We go back to
8 the attorney letters two months ago and they say, well, based
9 on all your suspicions, we're just gonna give our clients the
10 obvious instruction: Don't access their personal Gmail
11 account. Right? Their argument's saying defendants are in --
12 well within their rights to possess this Gmail account; it's a
13 work-related account. No evidence to support that Mr. VanDeHey
14 had used this account regularly. Could there -- was there an
15 email from 2012? Probably. You know, this does not make this
16 Gmail account a work-related account.

17 Now, we have this position that somehow defendants are
18 gonna be caused irreparable harm if he doesn't turn over his
19 personal Gmail account to them. I remind you, Your Honor,
20 three days before they confiscated this 29 platform G --
21 Google -- 19 gigabytes of material. We didn't hear the word
22 "Gmail" once in oral argument as to what assets needed to be
23 transferred in order for the operation of Valentine Life to
24 continue because the truth is -- and defendant knows it -- this
25 Gmail account was never contemplated; this Gmail account was

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1 never used in the operation of the business.

2 Mr. VanDeHey -- we suspect that the only way that
3 defendants gained access to this account was he used the same
4 password for his Gmail account as he did with this RSD account.
5 That in no way conveys any expectation or any authorization
6 that somehow RSD can now use that same password and invade his
7 account that includes -- that was our primary means of
8 communication with him. So, on September 11th, we find out
9 that it's hacked. That day we sent a letter to plaintiffs'
10 coun- -- to defendant's counsel. And basically we're met with:
11 Go the ordinary course. Serve us with -- serve us with your
12 discovery. We're gonna give an instruction not to access this
13 personal Gmail account. And then we're met with this argument
14 that somehow there's this implied authority that this was a
15 used and necessary component to operate Valentine Life. And,
16 frankly, it's absurd. I can't envision a scenario where either
17 the Computer Storage Act or the Computer Fraud and Abuse Act
18 would be constructed other than to prevent exactly this type of
19 a scenario.

20 And, Your Honor, what we're being met with here is we
21 are being -- the approach is clear, to just outlast the
22 plaintiff. The obvious frauds that have been committed are
23 just bold-faced attempts -- and, actually, not even afraid of
24 culpability. We've already pointed out to Your Honor about the
25 fraudulent documents presented to the Secretary of State. The

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1 PayPal account was fraudulently taken over in a similar way as
2 the Gmail account. The Gmail account was just completely
3 hacked and denied. And now, when they have their hand caught
4 in the cookie jar, they say, oh, yeah, it was me; but I was
5 justified to do so. The obvious attempt here is to raid the
6 LLC of all of its assets, strap it with all of its liability,
7 and just dare Mr. VanDeHey to sustain the litigation costs and
8 maybe last long enough in order for a final adjudication on the
9 merits which will obviously and ultimately be in the
10 plaintiff's favor.

11 And I know, Your Honor, that defendants keep trying to
12 bring us back to somehow there was an admission of \$800,000 of
13 embezzlement. The fact is we haven't answered the arbitration
14 demand for the reasons that I expressed here, Your Honor.
15 Until we can get an understanding of who has seen our
16 litigation strategies for the arbitration, we simply are too
17 prejudiced to respond to the arbitration demand. And I find it
18 curious, Your Honor, that defendants' counsel, taking the
19 position that the defendants are in the rightful possession of
20 this account, at paragraph 18 of their Certification, say I
21 haven't seen any emails between Mr. VanDeHey and its counsel.
22 Well, that means that you haven't looked at the Gmail account
23 because it's littered with it. So why haven't you looked at
24 the Gmail account? If your client's in the rightful
25 possession -- you're making a legal argument as to why your

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1 client's in rightful possession of it. You haven't reviewed
2 it?

3 So what are we supposed to do? What a mess the
4 defendants have created. If they wanted a document, they could
5 have requested it. We could have sought a protective order.
6 We could have provided a privilege log. To take it and say I
7 needed to get in it because I think that there was some RSD
8 stuff in there and now I have it and now I need it and now I
9 deserve it and then to criticize me for not going through the
10 rightful procedures under the federal rules of discovery . . .
11 They should have done what we did. If they thought that there
12 was something in this Gmail account, they should have asked for
13 it. We could have objected to it. There could have been a
14 protective order; there could have been a production; there
15 could have been something. To take his RSD password, enter it
16 into a Gmail account, download it, and then deny it -- Your
17 Honor, they say -- this is quite telling, Your Honor. On
18 page . . . At page 5, Your Honor, of the opposition, which is
19 Document 62 -- this is the defendant's opposition, first full
20 paragraph:

21 "To be clear, Mr. Kho did not delete any of the emails
22 within the tvandehey@gmail.com account. Instead, Mr. Kho
23 attempted to download all RSD communications from the date of
24 Vandehey's termination until September 11, 2017." No citation
25 to any evidentiary hearing support.

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1 The next sentence: "However, after several attempts, a
2 bulk download of emails was ultimately unsuccessful." Right,
3 Your Honor? No citation to any factual record.

4 However, we then see on page 8, bottom paragraph:

5 "Here, Mr. Kho has admitted to ... accessing the Gmail
6 account to preserve the interests of RSD, ... not sharing the
7 private email contents, and (3) keeping a copy of the hard
8 drive containing the emails in a locked facility."

9 So we're told: Don't worry. It was unsuccessful.
10 Despite your LIFARS forensic experts, that the plaintiff had to
11 spend thousands of dollars for the investigation, has proven
12 that the platform of 29 products spanning 19 gigabytes was
13 downloaded on September 11th, Mr. Kho was unsuccessful in the
14 download; but he's got a copy of it in a safe location. And he
15 didn't see any attorney-client communications other than the
16 communication that was sent to Ms. Magedoff, my associate;
17 Ms. Nissenbaum, the head partner of my firm; and me.

18 And, then interesting, Your Honor, this one -- this I
19 would like to have some sort of an explanation that makes
20 sense. It's a citation to Exhibit H of their opposition. This
21 is to somehow show that Mr. VanDeHey was using his Gmail
22 account to service customers. This is "From: lsilva@hbms.com"
23 dated September 25th, 2017, "To: tvandehey@gmail.com." I have
24 no idea how they got that, Your Honor. There are so many
25 unanswered questions. This is two weeks after this supposed

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1 download that was unsuccessful. This is two weeks after we put
2 them on notice that someone was interfering with our client's
3 email address. This is two weeks after I received a response
4 from Mr. Gutierrez, on September 12th, 2017, saying: "There is
5 little instruction I can pass to my client beyond the very
6 obvious: Do not access Mr. VanDeHey's personal Gmail account."

7 So, Your Honor, quite frankly, I'm here for more
8 answers than questions. It's clear on its face that Mr. --
9 that the plaintiff here cannot be trusted. We're told, Your
10 Honor --

11 COURT REPORTER: Remove the items from the microphone.

12 MR. PROCACCINI: I'm sorry. Sorry about that. Thank
13 you.

14 Your Honor, there was a passing remark made in this
15 opposition, if you call it that -- I call it an admission --
16 that what we should have done is we could have sent a
17 spoliation notice and we could have served discovery. I have
18 for Your Honor our August 16, 2017, spoliation notice for your
19 consideration if I can pass it up.

20 THE COURT: Is it not attached?

21 MR. PROCACCINI: It's not attached, Your Honor. I --
22 we could offer -- we could --

23 THE COURT: You can just represent for me you sent --

24 MR. PROCACCINI: Okay.

25 THE COURT: -- August 16th you sent a spoliation

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1 letter.

2 MR. PROCACCINI: August 16th we sent a spoliation
3 letter to MGA Law, Mr. Knauss. And it has your typical
4 spoliation language as if -- as though a spoliation letter is
5 necessary. We believe the obligations are quite clear under
6 the rules.

7 THE COURT: I agree.

8 MR. PROCACCINI: So, Your Honor, we sent a spoliation
9 notice. But where this is relevant is on August 16 we sent the
10 spoliation notice as if we're supposed to trust the plaintiff
11 to keep this database that wasn't downloaded but yet is kept in
12 a safe, locked location. And his opposition to what was our
13 oral argument on September 8th clearly all the RSD emails and
14 assets are the subject of this dispute; right? This is about
15 the operation of an LLC where Mr. VanDeHey had an RSD email
16 account and basically conducted all of his business through
17 that.

18 In a certification by Mr. Kho in support of that
19 opposition:

20 [Reading] Much of the social media was deleted
21 immediately upon the dissolution of Valentine Life and
22 termination of Todd Valentine -- Vandehey from RSD. The
23 YouTube channel associated with RSD were deleted and much of
24 the social medial in the name of Todd -- of RSD Todd was
25 deleted as well. There can be no return to the August 10

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1 status as YouTube is permanently deleted, and same with RSD
2 email, making this request impossible. There is no way to even
3 regain most of the assets that Todd lost access to because we
4 permanently deleted the email account
5 todd@realsocialdynamics.com.

6 Now that's important on a lot of levels. First of all,
7 that violates the spoliation notice if that's where we choose
8 to place our focus.

9 The second part is it's telling that the means at which
10 to access the plaintiff's Gmail account was through the
11 recovery email address which was this email address that they
12 say they deleted. They took his cell phone number, replaced it
13 with his. They took his former RSD email address that they say
14 they deleted and created a Hotmail address.

15 So I don't know. Did they -- is it a fraud that they
16 say they deleted the account? They did? They didn't? They
17 used it. They changed it. They took it. I don't know what
18 the rules are here, Your Honor.

19 But, clearly -- I think it's actually -- I think it's
20 beyond reasonable to say that somehow plaintiff is stepping
21 outside of the Rules of Federal Procedure by not serving a nice
22 little interrogatory or a document request when we're serving
23 letters putting them on notice the house is on fire -- we need
24 protection, you need to stop, you need to give us back our
25 attorney-client protected information -- and we were met with

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1 you're asking us to disclose a privilege as if they enjoy a
2 privilege by maintaining our privilege information.

3 So, Your Honor, we need some direction here because
4 we're facing an arbitration. I have no idea what defendants'
5 counsel knows about our legal strategy. He says he hasn't seen
6 the emails. I guess maybe if he didn't access the Gmail
7 account in which case I don't know how he can opine as to
8 what's in it. We need our information back. We need them to
9 give it back to us. We need an independent expert to help us
10 get it back, to know what damage has been done.

11 And the three-month stall, Your Honor, we want to get
12 this case back on track. We want this case consolidated. We
13 want to pursue the federal crimes that have been committed.
14 And we need to bring this case back on track.

15 Thank you, Your Honor.

16 THE COURT: Thank you.

17 MR. GUTIERREZ: Thank you, Your Honor.

18 THE COURT: Give me just one second.

19 (Pause in the proceedings.)

20 THE COURT: Mr. Gutierrez.

21 MR. GUTIERREZ: Thank you, Your Honor.

22 Your Honor, just to start with your first question to
23 counsel which is why didn't he hold a discovery plan or a
24 Rule 26 conference dispute petitioning this Court for expedited
25 discovery. And that's been my position all along, Your Honor.

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1 The reason why -- he can send every letter in the world to me
2 asking me what my client knows or doesn't know -- and the
3 reason rules are set up -- like interrogatories that are
4 verified by the client, like RFAs that have sanctions for
5 failing to -- if you answer improperly, or requests for
6 production of documents that would be held to a motion to
7 compel -- is because those are discovery that's directed at the
8 client. They are not directed to me to tell him what my client
9 said because how do you impeach my client through a letter
10 through me.

11 So I said send -- send this to my client. Send him an
12 interrogatory. Send him a request for admission. Depose him.
13 These are all questions you ask my client; you don't ask me.
14 And that's why the rules are set up this way. And, for counsel
15 to fail, admittedly fail, to not send a single request; not
16 send a single -- when he did try to schedule a deposition, he
17 did it on six days' notice. And I said I'd be more than happy
18 to produce my client --

19 THE COURT: Well --

20 MR. GUTIERREZ: -- just give me some time. And that's
21 really where --

22 THE COURT: Well, why haven't we had a Rule 26
23 conference here?

24 MR. GUTIERREZ: I have no idea, Your Honor. It's --
25 they've asked for expedited discovery. Um --

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1 THE COURT: Yeah. But that was super narrow.

2 MR. GUTIERREZ: Yeah. The plaintiff should have
3 noticed a Rule 26 conference and we would have had a discovery
4 and scheduling order and we would have moved forward with it.
5 So it's something that should have been done. I agree.
6 Um . . .

7 THE COURT: Well, and I recognize it's the plaintiff's
8 burden to initiate that. But you guys could have started it
9 too. So I'm just trying to --

10 MR. GUTIERREZ: And --

11 THE COURT: -- understand why this is moving along like
12 it is, and it just seems to be a sandbox fight going on with
13 nobody caring about the rules of discovery or coming up with a
14 discovery plan --

15 MR. GUTIERREZ: Maybe --

16 THE COURT: -- which --

17 MR. GUTIERREZ: -- to answer --

18 THE COURT: -- really --

19 MR. GUTIERREZ: -- your question --

20 THE COURT: -- would --

21 MR. GUTIERREZ: -- yeah.

22 THE COURT: -- address most of this.

23 MR. GUTIERREZ: Maybe, to answer your question, Your
24 Honor, it's because procedurally -- the way we viewed this case
25 was we never answered it. We filed a motion to dismiss and

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1 compel arbitration saying this is the wrong forum. So if we
2 didn't answer --

3 THE COURT: I know.

4 MR. GUTIERREZ: -- that should --

5 THE COURT: But you --

6 MR. GUTIERREZ: -- have triggered.

7 THE COURT: -- don't have to answer.

8 MR. GUTIERREZ: Correct. So, yeah, a Rule 20 --

9 THE COURT: It's first appearance that triggers that --

10 MR. GUTIERREZ: Correct.

11 THE COURT: -- 30-day deadline.

12 MR. GUTIERREZ: So you're right, Your Honor. Both
13 sides admittedly missed that we should have done a Rule 26
14 conference. And that would have -- that conference, Your
15 Honor -- and the purpose of that conference would have led to
16 these questions that would have led to the discovery that they
17 are ultimately seeking through a TRO. And that's why we're
18 here on emergency injunctive relief that they are seeking
19 because they never sent discovery.

20 And we could do a Rule 26 conference today. We can get
21 this case on track. But the way the case gets on track is by
22 them sending discovery to my client. My client setting forth
23 his position. We do depositions of both sides. We already
24 have an understanding of Nevada law that both sides have to
25 preserve emails. But what they are really seeking through this

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1 is a mandatory injunction on trying to force Mr. Kho to turn
2 over electronic media that they can just -- and all his
3 passwords -- so that they can wholly look through which is
4 absolutely improper under the means that they are doing it.

5 And we cited cases, Your Honor, including the *Patel*
6 *Energy* case, where the court struggled with granting that
7 relief and said the only reason we're granting the relief to
8 turn that hard drive over is because the defendants are
9 admitted hackers who were forced to post a \$25,000 bond.

10 So what they are effectively looking for, Your Honor,
11 is not answers. They're looking for -- they're looking for
12 RSD's hard drives, RSD's electronic information. They are
13 looking to get what they've already stolen. And we have a
14 arbitration demand out there alleging Mr. VanDeHey has stolen
15 over \$800,000 -- that is documented -- that we'll prove up.

16 But what we have in this particular case is, you
17 know -- if counsel said they didn't answer that case because
18 he's seeking a confirmation from me, well, I gave it in my
19 declaration. It's very clear. I never looked at any emails,
20 never looked at attorney-client emails. I don't have access to
21 that Gmail account. I never looked at any Gmail's. So, if
22 that's what he needs, it's in my declaration. Now --

23 THE COURT: I think his certain is your client looking
24 at, not you as much.

25 MR. GUTIERREZ: Correct. But he said -- he mentioned I

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1 can't answer the arbitration because I can't tell if defense
2 counsel can go forward in that case because of a conflict which
3 I think is absurd. If he has a certain against my client
4 that's one thing. But against me and my firm's representation
5 I made that very clear that's a non-issue.

6 So despite the differences as to authorization, which
7 is a key issue, did RSD have authorization to review that
8 account, Your Honor, we've submitted declarations from the CFO,
9 the COO, everybody saying that that was Mr. VanDeHey's primary
10 business account. In fact, Mr. VanDeHey gave Mr. Kho the
11 password and log in for that account so he can set up what's
12 called RSD Inner Circle and RSD Immersion Programs to help
13 Mr. VanDeHey back in 2010 start these programs through RSD as a
14 contractor.

15 So, Your Honor, I do agree with you. This case does
16 need to be put back on track but not through the injunction.
17 The appropriate relief, Your Honor, is to, I believe, hold a
18 Rule 26 conference to set up an expedited discovery schedule
19 and order and move forward with depositions of both Mr. Kho;
20 Mr. VanDeHey; bring discovery; production of documents; both
21 sides can confirm that they won't destroy any evidence. And we
22 just move --

23 THE COURT: I don't --

24 MR. GUTIERREZ: -- the case --

25 THE COURT: -- think --

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1 MR. GUTIERREZ: -- along.

2 THE COURT: -- both sides need to confirm that.

3 MR. GUTIERREZ: It's --

4 THE COURT: I think that there is an affirmative
5 obligation and there are numerous sanctions available under
6 Rule 37 if you violate that. So I assume that you've advised
7 your client of that. And --

8 MR. GUTIERREZ: Absolutely.

9 THE COURT: -- there's a spoliation letter that was
10 sent. And the way that gets handled is through Rule 37,
11 through the discovery process.

12 MR. GUTIERREZ: And that's absolutely correct, Your
13 Honor. That's why I'm so frustrated that we're even here today
14 because under an irreparable harm analysis there has to be no
15 adequate legal remedy. They have an adequate legal remedy of
16 spoliation. We completely understand. I've had numerous
17 trials where there's been instructions on spoliation for
18 violation. And that's --

19 THE COURT: Adverse inferences.

20 MR. GUTIERREZ: -- and that's -- and adverse inferences
21 and rebuttable presumptions but not TROs asking a court to hold
22 and order of what already is Nevada law. So that's the
23 frustration I have with us being here on an emergency basis
24 when you're correct, Your Honor, just noticing a Rule 26
25 conference and saying discovery would have kicked this all off.

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1 So, Your Honor, it's our position that this TRO must be
2 denied. We're prepared to hold a Rule 26 conference today to
3 set up a scheduling order. It might have been my
4 misimpression, Your Honor, that because Judge Koppe granted the
5 expedited discovery that a, you know, scheduling order would
6 follow with that Rule 26 conference. But we -- it's still
7 counsel and I's burden to hold that and to kick-start discovery
8 which --

9 THE COURT: And to provide a joint discovery plan.

10 MR. GUTIERREZ: Absolutely.

11 And the joint discovery plan will flush these issues
12 out. Any claims of privilege or -- that'll all be flushed out
13 and -- you know, the true issue in this is whether or not RSD
14 had authorized access to those emails at least for this limited
15 case. And down the line we'll get to the issue of whether or
16 not this case belongs here or in front of arbitration.

17 So at this stage, Your Honor, we request that the TRO
18 be denied. I'm prepared to meet with counsel, go through
19 discovery plans, and then just move this case forward.

20 Do you have --

21 THE COURT: Thank you.

22 MR. GUTIERREZ: -- any questions, Your Honor, for
23 anything?

24 THE COURT: I don't have any other questions.

25 MR. GUTIERREZ: Okay.

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1 MR. PROCACCINI: Your Honor, may I?

2 THE COURT: I'm sorry?

3 MR. PROCACCINI: May I?

4 THE COURT: Of course.

5 MR. PROCACCINI: Thank you, Your Honor.

6 Your Honor, this sounds nice as if -- as though a
7 discovery conference would have somehow prevented the defendant
8 from reading all of my client's emails, Your Honor. I don't
9 understand how we're shifting this into how come this case
10 isn't on its normal track. It's very unusual, I believe, three
11 days after leaving federal court to hack into my communications
12 with the client. It is an emergency, Your Honor.

13 Exhibit G to our papers, September 5th, 2017, email
14 from the plaintiff to me and my -- and my attorneys about
15 information that directly relates to the arbitration.

16 THE COURT: So let me --

17 MR. PROCACCINI: I don't understand what more of an
18 emergency there could be.

19 THE COURT: All right.

20 MR. PROCACCINI: I don't --

21 THE COURT: Well, how --

22 MR. PROCACCINI: -- understand how else to prevent
23 this.

24 THE COURT: Mr. Procaccini, how is it still an
25 emergency? Either it's happened -- the cat's out of the bag --

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1 MR. PROCACCINI: Hmm?

2 THE COURT: -- they've got the cat --

3 MR. PROCACCINI: Pardon me?

4 THE COURT: Either -- either -- if this happened --

5 MR. PROCACCINI: Yes.

6 THE COURT: -- if you're correct --

7 MR. PROCACCINI: Yes.

8 THE COURT: -- and he has read all of these emails --

9 let's --

10 MR. PROCACCINI: Yes.

11 THE COURT: -- assume the worse.

12 MR. PROCACCINI: Sure.

13 THE COURT: Okay?

14 MR. PROCACCINI: Um-hum.

15 THE COURT: Assume that Mr. Kho has read all of the

16 emails, okay --

17 MR. PROCACCINI: Yes.

18 THE COURT: -- cat is out of the bag --

19 MR. PROCACCINI: Yes.

20 THE COURT: -- so the standard for injunctive relief --

21 let's put aside completely the fact that there is, in my

22 opinion, discovery procedures that handle all of this. But, if

23 the cat's out of the bag, he's read everything, what

24 irreparable harm will happen in the future absent the relief

25 you're asking --

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1 MR. PROCACCINI: Your --

2 THE COURT: -- for?

3 MR. PROCACCINI: -- Honor, what we'd like to know is --
4 I still haven't heard a satisfactory answer to my question --
5 is how an attorney can say there's nothing wrong with what they
6 did, but I refuse to look at it. We are entitled to
7 investigate what happened to this, did it go to the --

8 THE COURT: Right.

9 MR. PROCACCINI: -- the law firm, Your Honor.

10 THE COURT: Through discovery.

11 MR. PROCACCINI: Through discovery? I -- I --
12 honestly, Your Honor, I can't believe that. The Computer Fraud
13 and Abuse Act is exactly meant to contemplate this. I have a
14 proven --

15 THE COURT: Then you have Computer Fraud and Abuse Act
16 claims. That's --

17 MR. PROCACCINI: That's six months --

18 THE COURT: That's --

19 MR. PROCACCINI: -- from now.

20 THE COURT: -- the case.

21 MR. PROCACCINI: So six months from -- Your Honor, six
22 months from now after we've lost in arbitration I can prove
23 then that the Gutierrez law firm had our entire litigation
24 practice.

25 THE COURT: That's why you have claims.

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1 MR. PROCACCINI: Okay. All right, Your Honor.

2 We have no alternative, Your Honor. This was our last
3 resort to protect the plaintiff's interests and to protect our
4 communications, to send an interrogatory, tell me when you
5 received the September 5th strategy about our arbitration, and
6 then they have 60 days to answer, and then we're gonna move to
7 compel and deficiency notices, and then in -- in -- I don't
8 know --

9 THE COURT: No. We start --

10 MR. PROCACCINI: -- maybe March --

11 THE COURT: -- with a discovery plan and some protocols
12 for these things and a protective order and a confidentiality
13 order and a protocol for who handles what intellectual property
14 in the meantime. And all of that got skipped here.

15 MR. PROCACCINI: Okay. Exactly, Your Honor. It got
16 skipped. They just said I'm takin' the information rather than
17 giving us a request where we have privilege logs. They did
18 exactly the opposite of what you're suggesting and they are
19 being rewarded for it, Your Honor.

20 THE COURT: How are they being rewarded for it?

21 MR. PROCACCINI: Because they are allowed to keep it
22 and they are not being penalized for doing it. They
23 committed --

24 THE COURT: If they did what you say they did --

25 MR. PROCACCINI: Yes.

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1 THE COURT: -- your remedy is through Rule 37
2 ultimately in this case.

3 MR. PROCACCINI: And he'll --

4 THE COURT: There are --

5 MR. PROCACCINI: -- never get there because they've
6 confiscated all the money. They've raided his PayPal account.
7 His credit's being destroyed. His Social Security number is
8 attached to a PayPal account that they've confiscated.

9 This is all a battle of attrition. They are steal
10 first, answer later. And they are hopin' the answer never
11 comes. And we are entitled to this emergent relief under the
12 statute where we can prove that they have it and we can prove
13 that our rights have been violated and we can prove their
14 negative intent in doing so.

15 THE COURT: All right. I appreciate your argument.

16 MR. PROCACCINI: Thank you, Your Honor.

17 THE COURT: Thank you.

18 All right. So it's my intention to rule today. I'm
19 not going to issue a separate written order, so I'm going to
20 put my findings and conclusions on the record here. I'm gonna
21 start with the standard.

22 The legal standard for issuing a TRO, a temporary
23 restraining order, and the legal standard for injunctive relief
24 are "substantially identical." "A party seeking a preliminary
25 injunction must meet one of the two variants of the same

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1 standard," that *Winter* standard.

2 "Under the original" standard from *Winter v. Nat. Res.*
3 *Def. Council, Inc.*, "a party must show 'that he is likely to
4 succeed on the merits, that he is likely to suffer irreparable
5 harm in the absence of preliminary relief, that the balance of
6 equities tips in his favor, and that an injunction is in the
7 public interest.'"

8 "Under the 'sliding scale' variant of the *Winter*
9 standard," established by the Ninth Circuit in *Shell Offshore,*
10 *Inc. v. Greenpeace*, "if a plaintiff can show only that there
11 are serious questions going to the merits--a lesser showing
12 than likelihood of success on the matters--then a preliminary
13 injunction may still issue if the balance of hardships tips
14 sharply in the plaintiff's favor, and the other two *Winter*
15 factors are satisfied."

16 In this case, I don't find that the plaintiff has
17 established that he is likely to succeed on the merits of his
18 claims such that he could prevail on any portion of his motion
19 original the original *Winter* standard. There is evidence from
20 the defendants about how these accounts were set up, how they
21 were used, and how they were business accounts. And I don't
22 have that similar evidence from the plaintiff. But there has
23 been enough showing to award a portion of the requested relief
24 under the sliding scale variant of the *Winter* test. At most, I
25 can say that the plaintiff has shown serious questions going to

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1 the merits of his claim that this email account was his
2 personal account, not the company's account. Because the
3 plaintiff has established that there may be attorney-client
4 communications in that account, there is a public interest in
5 protecting those communications, and there is a likelihood of
6 irreparable harm without some temporary relief. And, finally,
7 due to the potential presence of attorney-client privileged
8 information in that account, I can also say that the balance of
9 hardships tips sharply in the plaintiff's favor for the moment,
10 because the parties have not sat down to work out a protocol
11 for dealing with that account in light of this litigation.
12 But, once that opportunity has been taken, the balance, in my
13 mind, will no longer be sharply tipped in favor of the
14 plaintiff.

15 But the only irreparable harm that I think has been
16 demonstrated here is the potential disclosure of
17 attorney-client communications if the email account and its
18 contents are further accessed. To the extent that any
19 privileged material has already been read, I think -- like I
20 was saying, I think that cat is out of the bag, and injunctive
21 relief won't put the cat back in the bag, and the plaintiff has
22 affirmative, legal claims to address that in this case. And I
23 think that there are Rule 37 sanctions and remedies that are
24 fully available to address if we get to that point and if all
25 of that is true.

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1 There has not been a showing that the defendants will
2 destroy evidence without injunctive relief. If there were such
3 a likelihood, there are, again, multiple remedies for that type
4 of litigation abuse. The defendants have an affirmative duty
5 to preserve evidence. Let me say that again -- actually, both
6 sides have an affirmative duty to preserve evidence in Nevada.
7 I don't know where -- I mean, I assume in most states you do.
8 I think that is the federal rule for sure. If that duty is
9 violated, again, a wide range of remedies available to the
10 party that is hurt by the violation of that duty--most of those
11 are under the rules of discovery, particularly Rule 37--and
12 they range from evidence exclusion, to adverse inferences, to
13 case-dispositive sanctions, to money sanctions. Those are all
14 available under Rule 37. But I think there are many, many
15 hoops that have to be jumped through before those sanctions can
16 be applied here. And the plaintiff cannot do an end-run around
17 the discovery process and the magistrate judge and come to the
18 district court asking for injunctive relief instead of
19 following the discovery rules and protocols. So I will not
20 grant injunctive relief to compel the defendants to hand over
21 their computers and electronic devices. That's gonna have to
22 be accomplished through requests for production. You'll also
23 need to go through the discovery process to try to obtain that.
24 And I won't grant injunctive relief to compel depositions on
25 five days' notice when the parties haven't even had their

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1 Rule 26 conference or filed a discovery plan. And the Order
2 that Judge Koppe entered for expedited discovery was incredibly
3 narrow -- I think that's Docket No. 40 -- and that only
4 involved a very limited area of discovery and this doesn't fall
5 into it. So the only injunctive relief that I see warranted at
6 this time is to prevent either party from accessing this
7 disputed email account until they have developed a proper
8 protocol for dealing with that account and had that protocol
9 approved in the discovery plan.

10 So parties will need to work out and have the
11 magistrate judge approve a protocol for handling that email
12 account, and any other disputed property, and the contents of
13 that email account as part of your discovery plan, which I
14 assume will include some type of protective or confidentiality
15 order. I can't imagine that it makes sense for anyone to
16 continue to use that email account going forward, so it
17 shouldn't continue to be an active email account for either
18 side in this case. But, until you work out and have the
19 magistrate judge approve a protocol as part of your discovery
20 plan, which I assume, again, will include some type of
21 confidentiality order,

22 I am ordering the parties to hold the Rule 26
23 conference and then file a discovery plan and disclosures under
24 Rule 26 and Local Rule 26-1. I'm gonna put this on short
25 order. It is -- this must be done -- it must be filed, the

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1 discovery plan, by December 21st. It's already a few months
2 late.

3 And, until that discovery plan is approved, I am
4 entering a limited and temporary restraining order that
5 restrains either party from accessing the tvandehey@gmail
6 account -- I got that one right; right? That's what it is, the
7 tvandehey@gmail -- that's the one?

8 MR. PROCACCINI: Yes, Your Honor.

9 THE COURT: -- account. Or -- and this TRO will expire
10 upon the court's approval of the discovery plan. If you cannot
11 reach an agreement on the protocol for this, your proposed
12 discovery plan should include, as Local Rule 26-1(a) requires,
13 "a statement of each party's position on each point in
14 dispute." So you'll need to follow the rule. And then, if you
15 can't agree on things, it's going to be up to the magistrate
16 judge to decide what the protocol's gonna be and how things are
17 gonna happen or she might pull ya in for a discovery
18 conference. There are a number of ways this gets resolved
19 through the discovery process before it becomes an emergency
20 requiring injunctive relief.

21 And so that the parties can better assess what has been
22 disclosed from that account, I am also ordering the defendants
23 to provide an electronic copy of whatever was copied or
24 downloaded from that email account to plaintiff's counsel by
25 Tuesday, December 12th -- it's electronic. It shouldn't be

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1 difficult -- Tuesday, December 12th at 3:00 p.m. So that needs
2 to be delivered to them by 3:00 p.m. on December 12th.

3 MR. GUTIERREZ: (Nods head.)

4 THE COURT: So I want to make it very clear the issues
5 raised in this motion, I think, are more properly discovery
6 issues and the discovery rules and procedures are set up to
7 handle these types of issues. Asking the court to compel the
8 defendants to produce laptops, mobile phones, hard drives, or
9 any other hardware, or to compel depositions with five days'
10 notice when there hasn't been a Rule 26 conference, let alone
11 discovery requests or deposition notices served, is, in my
12 mind, asking to be excused from the discovery rules and
13 process, and this record does not support such unconventional
14 relief. I know that the clients on both sides of this case
15 feel that all of these issues are urgent and important -- I
16 understand that -- but every litigant in this courthouse feels
17 that way. And everyone will have to go through the discovery
18 process just like everybody else.

19 So, in summary, the Motion for a Preliminary Injunction
20 is denied, but the request for a Temporary Restraining Order is
21 granted in part:

22 Again, the parties are ordered to hold their Rule 26
23 conference and then file a discovery plan and disclosures under
24 Rule 26 and Local Rule 26-1 by December 21st.

25 Until that discovery plan is approved, I am entering a

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1 limited and temporary restraining order that restrains either
2 party from accessing the tvandehey@gmail account. This TRO
3 will expire upon the court's approval of the discovery plan,
4 which should include the protocol for how to deal with that
5 account and its contents; so that will replace the need for
6 this. If the parties cannot reach an agreement on this
7 protocol, their proposed discovery plan must include "a
8 statement of each party's position on each point in dispute" as
9 Local Rule 26-1(a) requires. I do not find that any bond
10 should be required in light of the scope and type of injunctive
11 relief that I am granting and essentially the mutuality of it,
12 which is that neither side can access -- further access that
13 email account at this point.

14 So it's further ordered that the defendants must
15 deliver an electronic copy of everything that was copied or
16 downloaded from that tvandehey@gmail account to plaintiff's
17 counsel by Tuesday, December 12th, 2017, at 3:00 p.m.

18 Is that right? Is that the date? Yes, Tuesday.

19 In all other respects, the motions for a TRO and
20 preliminary injunction are denied.

21 Does anyone need any clarification?

22 MR. VANDEHEY: (Hand raised.)

23 THE COURT: Mr. VanDeHey, you'll have to speak to your
24 attorney and he'll communicate that to me.

25 MR. GUTIERREZ: Nothing from the defendants, Your

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1 Honor.

2 THE COURT: Thank you.

3 MR. PROCACCINI: Your Honor, could I just ask him?
4 Because I believe it has to do with the immediate operation of
5 this email address since --

6 THE COURT: Of course you may.

7 MR. PROCACCINI: May I just confirm?

8 THE COURT: Absolutely.

9 MR. PROCACCINI: Thank you, Your Honor.

10 (Attorney-client discussion.)

11 MR. PROCACCINI: Your Honor, I mean, I don't -- I
12 don't, quite frankly, know how to deal with this issue. It's
13 his personal email address. All of his finances, his whole
14 entire life is there and now he's prevented from using it,
15 immediately prevented from using it. I --

16 THE COURT: Because --

17 MR. VANDEHEY: Can I even back it up? Can I take this
18 stuff and have them send it somewhere else? Like, what can
19 I -- everybody's -- everybody in my life sends everything
20 there. It is my personal account.

21 THE COURT: And that is why you all are gonna have to
22 get together and figure out what to do with this. I'm not
23 going to make that call today.

24 MR. PROCACCINI: Okay.

25 THE COURT: There are meet and confers. You understand

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1 all the details of it. You said you understand all of the
2 details why you think it's yours. You all have to get together
3 and try to work this out. If you can't, the discovery
4 commissioner is going to find a way to come up with a protocol
5 for this.

6 I understand. We all have email accounts, Gmail
7 accounts, that we've had for 20 years. I get that. But it's
8 locked down right now is what's happening because there is a
9 dispute; it is a dispute and --

10 MR. VANDEHEY: (Hand raised.)

11 THE COURT: -- Mr. VanDeHey, I understand. Trust me.
12 I get it. You're gonna have to find another way to communicate
13 for a while.

14 MR. VANDEHEY: Can I --

15 THE COURT: And I -- it puts the urgency on --

16 MR. VANDEHEY: -- say one thing --

17 THE COURT: -- both sides.

18 MR. VANDEHEY: -- please?

19 THE COURT: Again, I'm gonna ask you to speak through
20 your attorney because -- because -- I'm protecting you by doing
21 that, sir. Really I am. He gets, you know, the legalities of
22 this. And I know this is very personal to you and emotional.
23 And it's important when you're represented that you get the
24 opportunity to talk to your lawyer and let him kind of screen
25 what you're thinking. I promise you it's for your protection.

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1 MR. VANDEHEY: Okay.

2 THE COURT: But I think that further emphasizes why
3 this is urgent, further emphasizes why I set this on a week's
4 notice because I get it. I really do. But I think that your
5 remedies are through the discovery process and through you guys
6 actually talking, besides talking, and finding a way to work
7 this out.

8 And, Mr. Kho, I realize that it's not your personal
9 email address that's in the middle of this. But you also need
10 to find a way to work this out so that everybody's concerns can
11 get addressed.

12 MR. KHO: (Nods head.)

13 THE COURT: So it's just on Mr. VanDeHey at this point
14 to come up with a way; it's going to have to be mutual for you
15 guys. So that's my ruling.

16 Any other clarification required?

17 MR. PROCACCINI: No thank you.

18 MR. GUTIERREZ: Nothing from us, Your Honor. Thank
19 you.

20 THE COURT: All right. Thank you, everyone. Have a
21 good day. We're adjourned.

22 (Proceedings concluded at 10:41 a.m.)

23 ///

24 ///

25 ///

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

TODD VANDEHEY,)	Case No.
)	2:17-cv-2230-JAD-NJK
Plaintiff,)	
)	Las Vegas, Nevada
vs.)	Friday, December 8, 2017
)	9:57 A.M.
REAL SOCIAL DYNAMICS, INC.,)	Courtroom 6D
et al.,)	
)	MOTION HEARING
Defendants.)	<i>CERTIFIED COPY</i>

C E R T I F I C A T E

I, FELICIA RENE ZABIN, Official Court Reporter, United States District Court, District of Nevada, Las Vegas, Nevada, do hereby certify that pursuant to 28 U.S.C. § 753 the foregoing is a true, complete, and correct transcript of the proceedings had in connection with the above-entitled matter.

/s/ Felicia Rene Zabin
FELICIA RENE ZABIN, CCR No. 478
OFFICIAL FEDERAL REPORTER

Dated: December 25, 2017